

1 UNITED STATES DISTRICT COURT

2 EASTERN DISTRICT OF NEW YORK

3 WINDWARD BORA LLC, . Docket No.  
 4 Plaintiff, . 20-cv-05320-DG-MMH  
 5 v. . Brooklyn, New York  
 6 IRA THOMAS, et al., . Tuesday, December 14, 2021  
 7 Defendants. . 10:13 a.m.  
 8 . . . . .

9  
 10 TRANSCRIPT OF A TELEPHONIC MOTION HEARING  
 11 BEFORE THE HONORABLE MARCIA M. HENRY  
 UNITED STATES MAGISTRATE JUDGE

12 APPEARANCES:

13 For the Plaintiff: The Margolin & Weinreb Law Group,  
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## P R O C E E D I N G S

THE CLERK: Good morning. This is a civil cause for a motion hearing for case number 20-cv-5320, Windward Bora LLC v. Thomas, et al.

As a reminder, pursuant to Local Civil Rule 1.8, the parties may not independently record any court proceedings. A transcript of this proceeding may be ordered from the clerk's office.

That being said, counsel for Plaintiff, please state your appearance for the record.

MS. KAPNER: Good morning, Your Honor. My name is Alyssa Kapner from The Margolin & Weinreb Law Group for the Plaintiff, Windward Bora LLC, and I have this morning filed a notice for appearance on the docket.

THE COURT: Good morning, Ms. Kapner. I have seen your notice of appearance, so thank you for that.

THE CLERK: And there is no appearance for the Defendants, Judge.

THE COURT: For either Defendant?

THE CLERK: That's correct.

THE COURT: All right. Thank you very much.

All right. So Ms. Kapner, we are here on a motion for default judgment. And let me just do a quick recap of my understanding of the procedural history of this case.

The complaint was filed on November 3rd of 2020,

1 essentially requesting to foreclose on a mortgage for a  
2 property in Queens. There were a couple of affidavit for  
3 affirmations that were filed with the complaint regarding  
4 compliance with various foreclosure-related moratoriums that  
5 were issued by New York State, as well as the federal  
6 government, and I will return to those later when we get to  
7 the substance of the motion.

8 As I see here, the case had originally been  
9 assigned to Judge Cogan and then subsequently was reassigned  
10 to Judge Gujarati, who's the currently assigned District  
11 Judge. Similarly, Judge Bulsara had been assigned to the  
12 case and then it was subsequently reassigned to me.

13 Now, I do see two returned summonses executed on --  
14 as of December 23rd -- yes -- of 2020, at docket numbers 11  
15 and 12, as to both Defendant Ira Thomas and then Defendant  
16 New York City Environmental Control Board who we'll just call  
17 ECB for the purposes of this proceeding.

18 And then subsequently there was a request for a  
19 certificate of default as to both Defendants, and that -- now  
20 interestingly, in February of 2021, ECB filed a notice of  
21 appearance and counsel is listed on the docket. That counsel  
22 has not appeared today. And again, Ms. Kapner, I'll return  
23 to that subject to ask you a little bit about any  
24 interactions you may have had with counsel.

25 In any event, the clerk's entry of default was

1 filed on April 16th of 2021, at docket number 17, and then  
2 the motion for default was filed on September 21st of 2021.  
3 That motion was referred to me by Judge Gujarati for a report  
4 and recommendations on September 22nd of 2021.

5 And I subsequently issued a notice for this hearing  
6 and specifically sent that notice to Defendant Thomas at not  
7 only the address in Queens that is the subject of this  
8 foreclosure action but also to an address in Brooklyn that  
9 was part of the papers. And I do see that there's an  
10 affidavit of service for that notice of hearing that was sent  
11 to Defendant Thomas.

12 Have I missed anything in that procedural  
13 recitation, Ms. Kapner?

14 MS. KAPNER: No. That seems pretty comprehensive.

15 THE COURT: Okay. So I've had an opportunity to  
16 review all of the documents that I just rattled off and I  
17 have some very specific questions regarding many different  
18 elements of this motion.

19 I first want to understand -- again, because ECB is  
20 not quite in the same posture as Defendant Ira Thomas because  
21 ECB actually has at least appeared in this case. So have you  
22 or your colleague had any interaction with -- the counsel  
23 listed of record for ECB is Michele Mirro?

24 MS. KAPNER: No, Your Honor. We have not. This is  
25 actually a very commonplace notice of appearance. I'm just

1 looking at it right now from the docket that it's an  
2 appearance and waiver. So they basically are putting in the  
3 appearance so that they're notified regarding the sale to  
4 determine if there are any surplus monies at the end of the  
5 action that the ECB might be entitled to, so.

6 THE COURT: I see.

7 MS. KAPNER: Yeah. So they didn't file an answer.  
8 It's merely just so they get notifications of what they want  
9 to be notified of. So they're not contesting the action.

10 THE COURT: Well, that's interesting. All right.  
11 That is a helpful explanation and I guess explains why Ms.  
12 Mirro has not appeared today although, again, it's -- so that  
13 leads to my second question relatedly.

14 Is the intention that the judgment here and  
15 essentially all of the release that is being requested is  
16 being requested as to Defendant Thomas?

17 MS. KAPNER: Yes. So as a little bit of, you know,  
18 background explanation, so the Environmental Control Board  
19 has what we have determined based on -- we receive a  
20 foreclosure search before we start an action, and based on  
21 that it was determined that there were Environmental Control  
22 Board violations filed against the -- either the borrower or  
23 the property, which are subordinate to my client's mortgage.  
24 And I believe that those were attached to our complaint at  
25 the end -- yes -- it's page --

1 THE COURT: Yes.

2 MS. KAPNER: Yes. I see that. Yes.

3 THE COURT: Yes. There are several of them, and I  
4 did want to ask about those. Since you did bring them up,  
5 which I appreciate, I did want to ask about them because  
6 there are multiple violations for multiple Ira Thomases, and  
7 I guess I'm trying to determine which Ira Thomas is the  
8 operative one.

9 MS. KAPNER: Right. So the reason why we include  
10 all of those is merely because we are trying to cut those off  
11 in our judgment of foreclosure and sale. And it's really  
12 just for going forward if we have a foreclosure sale so that  
13 there is clear title for whatever happens after the  
14 foreclosure sale. If someone, third party, buys the property  
15 or if it goes back to the Plaintiff, it would basically wipe  
16 out any of the liens by the ECB that were filed prior to our  
17 action being commenced regarding the borrower and/or the  
18 properties.

19 So it's possible that not all of these are on the  
20 head, as we call it, of either the borrower or the property,  
21 but --

22 THE COURT: Right.

23 MS. KAPNER: -- we have to include them because if  
24 we don't include them then something -- you know, we might  
25 not have clear title in the end.

1           So only the ones that are actually applicable to  
2 the property at the end of the day will be, you know, voided  
3 if we get a judgment --

4           THE COURT:   Okay.

5           MS. KAPNER:  -- of foreclosure and sale and the  
6 other ones won't remain open.

7           THE COURT:   No.

8           MS. KAPNER:  Also, as you see, like the first two,  
9 which the first -- yeah, so especially the first two which  
10 are large amounts, especially relative.  You see the other  
11 ones, 100, 25, so we need to make sure that those are cut off  
12 in order to get clear title going forward.

13          THE COURT:   Right.  And just for the record, in  
14 part because there's likely going to be a transcript made of  
15 this proceeding, the document that we're referring to is  
16 Exhibit F to the complaint, which is document number 1-1 on  
17 the docket and it starts on page 41.  Well, the exhibit page  
18 F is at page 41 of 43.

19          And then page 42 of 43 starts the actual listing of  
20 the violations.  And on that page -- yes, there are seven  
21 violations and more continuing on the next page.  The first  
22 are against an Ira C. Thomas at 1136 Bergen Avenue in  
23 Brooklyn, but then the second two are against Thomas, Ira --  
24 presumably, that's last name, first name at 146-35 182nd  
25 Street in Springfield Gardens, which is the subject property

1 of this action.

2 Okay. I just wanted to clarify because you were  
3 talking about a document and hadn't actually referred to what  
4 document -- where the document was on the docket.

5 Okay. All righty. This is very helpful background  
6 and I appreciate you addressing and anticipating any  
7 questions.

8 All right. So now what I'd like to get back to are  
9 the foreclosure moratoriums, which were referred to in  
10 document number 3, the COVID-19 Pandemic Affirmation, and I  
11 just want to make sure that I understand that this action  
12 complies with those moratoriums. So can you provide a little  
13 bit more background around that, specifically whether or not  
14 this was filed subsequent to the expiration of any applicable  
15 moratoriums?

16 MS. KAPNER: Sure. So as you may know, there have  
17 been many different moratoriums and many different iterations  
18 of notice requirements throughout the pandemic since March of  
19 2020 regarding what Plaintiffs or law firms or services need  
20 to send to borrowers prior to actions and whether the  
21 moratorium applies, et cetera.

22 So in this case, at the time that the action was  
23 filed, the COVID-19 Pandemic Affirmation, which was filed as  
24 docket number 3, was the affirmation which was required at  
25 the time. So because we're in federal court, the state



1 moratorium -- the -- you know, the outright moratorium did  
2 not apply at this time and throughout this entire time. What  
3 we have been doing is if a borrower files or submits a  
4 COVID-19 Hardship Declaration, then we stay the case. But if  
5 not, then we don't.

6           So we served this document on the borrower prior to  
7 the action. And I just want to pull up the affidavit of  
8 service because -- yes, there is also the notice to the  
9 Defendant regarding the COVID-19 Hardship Declaration was  
10 also served on the borrower with the summons and complaint  
11 and other notices that were filed at the time the complaint  
12 was filed.

13           So that's basically how we've been proceeding is we  
14 serve the documents prior to starting the action, and if we  
15 got a response, then we would not proceed. And then it's  
16 also served at the time of the complaint and the same  
17 thing -- the borrower has had an opportunity throughout this  
18 entire case, whether we serve them or not with it, to, you  
19 know, say that they have a COVID hardship and then the case  
20 would be stayed based on that.

21           And in this case we have not received any  
22 correspondence from the borrower. And based on where the  
23 borrower was served -- and we believe that he does not live  
24 at the property being foreclosed so that might be a reason  
25 why -- now, if it could be a -- it could just be another

1 property that he's renting out and not necessarily something  
2 that, you know, he wants to have a -- you know, has a  
3 hardship for. Maybe he doesn't have a hardship. And --

4 THE COURT: Sure.

5 MS. KAPNER: -- you know, we don't know.

6 THE COURT: Sure. Okay. Well first, again, you  
7 are anticipating many of my questions, which I absolutely  
8 appreciate. Let me just chime in with a couple of loose  
9 ends.

10 So you said that the COVID Affirmation was served  
11 before the action. Can you tell me the date?

12 MS. KAPNER: Yes. Hold on. I just want to look at  
13 our complaint because I know in our complaint we weren't  
14 pleading that -- the date, but we should have it in our --  
15 hold on -- COVID letter envelopes. Okay.

16 Yes. They were sent on October 2nd, 2020.

17 THE COURT: Okay.

18 MS. KAPNER: Yeah. So I have a copy of the  
19 envelopes and they were sent by certified mail and regular  
20 mail. So you know what? Actually they were sent to the  
21 property address on September 30th, it looks like, and they  
22 were sent to -- so September 30th and October 2nd. So what  
23 we were doing at this time is we were sending that out and  
24 then waiting approximately 30 days -- at least 30 days before  
25 filing the complaint because there really wasn't any specific

1 guidance or dates that were given by the state so we were --  
2 we sort of just were being as, you know, generous as we could  
3 and obviously, like, knowing that anything could be filed or  
4 declared at any time during the case.

5 THE COURT: Right. Sorry. Okay. Thank you. That  
6 is also extremely helpful.

7 And then you made mention of -- when you said the  
8 affidavit of service, I think you were referring to ECF  
9 Number 11 --

10 MS. KAPNER: Exactly. Yeah. Summons returned  
11 executed, yes.

12 THE COURT: Yes. Which was the return executed  
13 summons that was effected on Mr. Thomas, and I do note that  
14 in that affidavit of service it indicates -- excuse me, that  
15 the notices required -- I'm going to say the full law because  
16 it's a transcript -- the Real Property Actions and  
17 Proceedings Law, or RPAPL, R-P-A-P-L, Section 1303 notices  
18 were also included with the summons and the complaint.

19 I did not see those notices in the papers. Is that  
20 something that you can provide? Just so you know, I'm going  
21 to be asking for several supplements following this hearing.  
22 Can you provide copies of those documents?

23 MS. KAPNER: Sure. That document is a document  
24 that usually our process server serves separately. So it's  
25 just like a form-like piece of paper that explains the

1 process of a foreclosure.

2 THE COURT: Yes.

3 MS. KAPNER: But it's definitely --

4 THE COURT: It's the statutory notice, yes.

5 MS. KAPNER: Yes.

6 THE COURT: Yes. I would like to see the one --  
7 because many of the papers in support of the motion and the  
8 complaint include other types of notices, like the default  
9 notice and the 90-day notice, so I'd like to see the 1303  
10 notice, as well.

11 MS. KAPNER: Right.

12 THE COURT: Okay. Let's see what else.

13 All right. So let's get into the motion papers  
14 themselves, and we can start at -- the motion, I believe, is  
15 docket number 18.

16 One of the first documents is the Declaration of  
17 Regularity in Support, and if you have the document in front  
18 of you, just let me know --

19 MS. KAPNER: Yes. Okay.

20 THE COURT: -- when you're ready.

21 MS. KAPNER: Yeah. I do. Yep. I'm ready.

22 THE COURT: Okay. So this is document number 18-1,  
23 and it's page 2 of 3, and it's paragraph 4, which is that  
24 the -- this affirmation repeats everything in the Affirmation  
25 in Support of the clerk's entry of default.

1           It's preferable to include that information in this  
2 declaration so that we don't kind of have to go bopping back  
3 and forth between this motion and the motion that was made to  
4 the clerk's office.

5           MS. KAPNER:   Okay.

6           THE COURT:   So this is more of a practice pointer  
7 because it's far easier for us to look at the motion when  
8 everything is all together.   But as I understand, whatever is  
9 in that affirmation is supposed to be incorporated by  
10 reference into this one?

11          MS. KAPNER:   Yes.   I mean, it's basically just  
12 reiterating that the Defendants were served and that their  
13 time to answer expired and seeking that the clerk enter  
14 default.

15          THE COURT:   All right.   Okay.

16          MS. KAPNER:   Understood.

17          THE COURT:   Okay.   Thank you.

18          The second point has to do with the next paragraph,  
19 paragraph 5, and this is actually a big concern of mine  
20 because in this declaration -- the Weinreb declaration, we'll  
21 call it, document number 18-1, paragraph 5 says that the  
22 affidavit of Yonel Devico -- have I pronounced that  
23 correctly?

24          MS. KAPNER:   Yonel Devico.   But yeah.   I'm going  
25 to --

1 THE COURT: Devico -- the member of Windward Bora,  
2 the Plaintiff, that the Devico affidavit was sworn to on the  
3 30th day of August of 2021. However, in looking at that  
4 affidavit, which is at document number 18-6, I think, in the  
5 motion papers -- looking at that affidavit at page 4, the  
6 notary signature on that is dated August 30th of 2020, so.

7 MS. KAPNER: Let's see if I --

8 THE COURT: Let me know when you're there.

9 MS. KAPNER: Yes. I see it. That was a typo. It  
10 should have been in the year 2021 on the notary.

11 THE COURT: Right. The problem here though is that  
12 that's the factual basis for much of your damages  
13 calculations, as well as other assertions in the memorandum  
14 of law, and so if the notary's signature is not valid then I  
15 would need to have a new notarized affidavit to look at.

16 MS. KAPNER: Okay.

17 THE COURT: Now, given that, the other questions I  
18 had were actual factual questions about the calculations of  
19 damages. So to the extent that you believe that the  
20 information will be the same in the revised affidavit, I do  
21 have to ask whether or not there are any damages or amounts  
22 due that are being requested beyond the period between  
23 February 1st of 2020 and July 27th of 2021?

24 MS. KAPNER: Yes. So what we do when we calculate  
25 that is we calculate it and then we send it to the client to

1 be reviewed and executed. So if we do a revised affidavit we  
2 might extend the date to whenever it's prepared.

3 THE COURT: Okay.

4 MS. KAPNER: And as you may see in the proposed  
5 judgment order, which is docket 18-3 --

6 THE COURT: Yes.

7 MS. KAPNER: -- on the first page, the third  
8 paragraph sets forth that X amount is due as of --

9 THE COURT: Yes.

10 MS. KAPNER: -- whatever the date.

11 THE COURT: Yes.

12 MS. KAPNER: Then on page 3 of 6, paragraph 3rd,  
13 again, it recites that. So that is the judgment amount that  
14 we're seeking, but when we, you know, proceed with setting an  
15 amount that for -- we called an upset bid, if we go to a  
16 foreclosure auction, amount that we would, you know, be  
17 seeking in order to be made whole, we would potentially add,  
18 you know, interest up until that date.

19 But you know, we can set whatever bid we want. You  
20 know, we can include whatever we want to include in that, but  
21 for the judgment itself we're just seeking the amount that's  
22 due up until the date in the proposed judgment.

23 THE COURT: Okay. And so, no, that does make  
24 sense. If I understand you correctly, you are going to get a  
25 revised affidavit. You may then extend the date past July

1 27th of 2021, up to the new date of preparation of the  
2 affidavit. And then you request a judgment in that amount?

3 MS. KAPNER: We'll only do that if we're going to  
4 be submitting a whole new motion because then the rest of the  
5 motion wouldn't necessarily be valid, but -- so we can talk  
6 about that. But as you see, we calculate the per diem, so  
7 the daily amount --

8 THE COURT: Yes.

9 MS. KAPNER: -- so basically, what we would do is  
10 just add the amount, you know, from July 27th, however many  
11 days times 22.02 to get the amount that we would be seeking  
12 just so it would be the most, like, up to date figure.

13 THE COURT: Okay. All right.

14 I'm just looking through my notes to make sure I've  
15 covered all of the questions that I have here. Give me one  
16 moment.

17 Okay. So what I have as the, I guess, supplement,  
18 and this can just be a letter to the extent that you need to  
19 explain anything and then attaching the documents -- a  
20 separate exhibit, please, just so that we can keep track of  
21 which documents are which.

22 MS. KAPNER: Sure.

23 THE COURT: So far I have RPAPL Section 1303  
24 notices and then the sworn Devico affidavit.

25 MS. KAPNER: Okay. I think that just to make it



1 easier regarding the affidavit, we'll probably just keep all  
2 the dates and the figures the same so that it doesn't, you  
3 know, confuse the proposed judgment order and everything else  
4 that we've already submitted.

5 THE COURT: Okay. That's fine.

6 All right. And how soon can -- how much time do  
7 you need for this?

8 MS. KAPNER: I mean, quickly, but I just don't know  
9 how quickly my client can get back to me. So I would say by  
10 the --

11 THE COURT: I was going to --

12 MS. KAPNER: -- end of next week?

13 THE COURT: Oh, I was going to give you until  
14 January 6th, but --

15 MS. KAPNER: Okay.

16 THE COURT: -- why don't I have you --

17 MS. KAPNER: How about -- can we do December 31st,  
18 even though --

19 THE COURT: Well, I will tell you that I don't like  
20 Friday deadlines --

21 MS. KAPNER: Okay.

22 THE COURT: -- so let's do December 30th.

23 MS. KAPNER: Okay. Let's do the 30th, okay.

24 THE COURT: Yeah. Friday deadlines, in my  
25 experience, always lead to Friday requests to extend the

1 deadlines, so the 30th.

2 MS. KAPNER: That's a Wednesday request to extend.  
3 Okay. So that's fine, 30th. Hopefully, I can get it back  
4 sooner, and if not I will let you know as soon as possible if  
5 we need more time.

6 THE COURT: Okay. That sounds good. All right.  
7 Is there anything else that you wanted to raise  
8 with the Court or any issues or arguments you wanted to make?

9 MS. KAPNER: No. Do you want us to serve the  
10 supplemental documentation on the borrower, as well?

11 THE COURT: Yes. Because while they technically  
12 have not appeared -- I mean, the action is still ongoing. So  
13 at some point they're going to get copies of whatever  
14 documents are filed by the Court anyway.

15 MS. KAPNER: Okay.

16 THE COURT: So yes. Okay.

17 All right. Thank you very much for your  
18 preparedness today. It's been very, very helpful and very  
19 much appreciated.

20 And if there is nothing else, then we are adjourned  
21 for today.

22 I wish you and your family a very safe and healthy  
23 holiday season. And thank you again.

24 MS. KAPNER: Can you tell Judge Briccetti in the  
25 Southern District how prepared I was.

1 THE COURT: I'm sorry?

2 MS. KAPNER: Judge Briccetti in the Southern  
3 District last week did not think I was as prepared as you  
4 did, so --

5 THE COURT: All right. Well, every judge does what  
6 they think is best. And you've answered my questions, so.

7 MS. KAPNER: Okay. Good.

8 THE COURT: That's what I have to gauge.

9 MS. KAPNER: It's helpful to also be able to access  
10 things if you don't bring them to court, you know, if you're  
11 at your computer.

12 THE COURT: Yes. I would agree.

13 All right. Thank you so much.

14 MS. KAPNER: Thank you, Judge. Have a good day.

15 THE COURT: Bye.

16 (Proceedings adjourned at 10:46 pm)

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## TRANSCRIBER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.-

January 8, 2022

*Terry Rubino*\_\_\_\_\_  
Terry Rubino\_\_\_\_\_  
DATE

Legal Transcriber